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The dilemma of bargaining fee clauses and the passing on of terms and conditions in collective agreements

The recent case of *National Distribution Union v General Distributors Limited* in the Employment Court is the first to examine the revised section 59B of the Employment Relations Act 2000 (ERA). This section addresses the widely held concern by unions that employees who do not pay union membership fees are able to "free ride" or "free load" off union efforts by receiving the same terms and conditions as union members without joining the union. Passing on terms and conditions that are the same or substantially the same as those in a collective agreement is prima facie lawful, except where the employer does so with the intention of undermining the collective agreement and the effect of the employer doing so undermines the collective agreement.

This case will be of interest to all employers with non union and union employees in their workplace.

Background

General Distributors Limited (GDL) operates three supermarket brands in New Zealand; Foodtown, Countdown and Woolworths, with almost 18,000 employees. Twenty five percent of GDL's waged employees are members of the National Distribution Union (NDU), who in 2005 successfully bargained for a wage increase of 60 cents per hour for its members. GDL agreed that non union employees could benefit from these improved terms and conditions provided they pay a bargaining fee.

GDL sought to increase the wages of non union employees and wrote to those employees about "wage reviews". GDL considered it was impractical to negotiate individually with non union employees and consequently decided on a percentage wage increase of 5.2 percent for Countdown staff and 5 percent for all other supermarket staff. This equated to an increase of between 54 and 57 cents per hour on average across the 3 supermarkets. While the average increases were less than what was provided to the union members, some higher earning employees fared better under the wage percentage increase offered by GDL.

The relevant statutory provision

Section 59B of the ERA provides that it is not a breach of the duty of good faith for an employer to agree to a condition or a term of employment for an employee who is not covered by a collective agreement which is the same or substantially the same as a term or condition in a collective agreement that binds the employer.

A spectrum of percentage increases is not substantially the same as set cents per hour increase

However, it is a breach of good faith under this section if:

- the employer does so with the intention of undermining the collective agreement; *and*
- the effect is to undermine the collective agreement.

A breach of good faith is more easily found where a collective agreement has not yet been concluded or where collective bargaining is taking place. In that case, a breach of good faith will occur where a union can point to either an intention to undermine, or the effect of undermining, collective bargaining.

Did GDL's percentage wage increase to non union staff amount to an unlawful "passing on," putting it in breach of its good faith obligations?

The Employment Court started by rejecting NDU's proposition that passing on could only occur lawfully pursuant to a bargaining fee arrangement to ensure that collective bargaining was not undermined by 'free riders'. Such a proposition ignored section 59B of the ERA which provided that passing on was prima facie lawful in the absence of an intent to undermine and the effect of undermining the collective agreement.

Was the pay rise substantially the same as that contained in the collective agreement?

The key fact that prevented a finding that the pay rise was "substantially the same" was that while union members achieved a flat rate increase of 60 cents per hour, non union employees were offered a percentage increase. Although a few employees did in fact achieve an increase of 60 cents per hour from the percentage increase, there was a spectrum of wage rates and some employees' wages increased well over this amount.

In terms of deciding whether something was "substantially the same", the Court considered that the adjectives "similar" or "substantially similar" were helpful, although the standard is higher given the use of the term "substantial".

Was there an undermining of the collective agreement?

The Court held that any undermining must be solely of the collective agreement, not an undermining of the union or its ability to bargain or attract members. In this case there was no evidence of the collective agreement being undermined.

Was there intent to undermine?

Intent to undermine was not identified by the Court as there was no evidence of knowledge by GDL that passing on would undermine collective bargaining, although the Court concluded GDL was likely aware that passing on affected the union's membership numbers generally.

Although the Court did not need to address this issue given its conclusion in relation to the question of whether the terms were "substantially the same", the Court noted that it would have applied the requirement of intent strictly, finding that intent to harm must be "at least a concurrent or activating purpose" because of the significant penal consequences of the section.

It was impracticable to individually bargain with non-union employees given the size of the operation

Was the effect of the passing on to undermine the collective agreement?

NDU argued that the effect of undermining could be seen in the evidence that employees saw no point in union membership because their wages would be reviewed annually in any case. The Court held that undermining could not consist solely of reducing the potential number of employees covered by the collective agreement. This is because the ERA allows employers to pass on the terms or conditions achieved in the collective agreement without employees joining the union. In any event, the NDU was unable to establish that its membership rates had decreased as a consequence of the passing on of terms and conditions.

The Court also took into account section 59B(6) of the ERA. This section contains additional factors which may determine whether an employer has acted with the intent to undermine and whether their actions have had the effect of undermining a collective agreement.

Employers should be aware of the following factors in section 59B(6) as they may influence a court's determination of whether the passing on of terms has had the effect of and was intended to undermine a collective agreement:

- Whether the employer bargained with the non-union employees before they agreed on the term or condition of employment
- Whether the employer consulted the union in good faith before agreeing to the term or condition of employment
- The number of employees bound by the collective agreement compared to the number of employees not bound by the collective agreement
- How long the collective agreement has been in force.

Section 63 of the ERA also requires that new employees who are not union members be offered the terms and conditions of the collective agreement.

In this case the court considered it impractical to require GDL to bargain individually with the non-union employees given the size of their operation. The good faith requirement was also met as there was no evidence of concealment by GDL and no evidence that GDL had tried to influence union members to resign. The number of employees bound by the collective agreement and the length of time the collective agreement had been in force were considered neutral factors in this case.

Did GDL act in bad faith by exercising undue influence or misleading or deceptive conduct?

NDU also argued that GDL's actions were a breach of good faith under section 4 of the ERA. This section requires parties to an employment relationship to deal with each other in good faith and provides that they must not do anything to directly or indirectly mislead or deceive each other.

The Court noted that GDL had been co-operative in the bargaining fee process and had complied with the union's wishes that posters be taken down which they perceived as encouraging employees not to elect to have the bargaining fee clause. GDL also adjusted the language on written information slips provided to employees as requested by the union.

NDU also complained about a form headed "Bargaining Fee – Your Choice" with boxes for employees to elect whether to have the bargaining fee clause or not.

There is a high threshold for proving unlawful passing on once a collective agreement is concluded

NDU argued this was not consistent with the ERA because the onus is on the employee to write to the employer of their decision to opt out. The Court held the method adopted by GDL was in the spirit of the Act and that they had clearly explained the process to employees.

NDU further alleged that GDL breached the good faith provisions by advising that the wage increases would be by individual negotiation, but were then made across the board to non union employees. The Court rejected this as GDL had invited individuals to discuss the wage review if they had any queries and to seek advice.

Finally, NDU submitted that it was implicit in the bargaining fee arrangements that the non union employees would not receive the terms and conditions in the collective agreement and GDL's actions of offering the wage increase to non union employees and backdating it to around the time of the collective agreement was misleading and deceptive conduct. The Court considered that GDL had signalled to NDU that the employer would review individual pay rates as it had always done annually, and that they had not engaged in any misleading or deceptive conduct but had acted with co-operation and good faith.

A high threshold

This case illustrates the difficulty of proving unlawful passing on once a collective agreement has been concluded. It would need to be proven:

- that a term is the same or substantially the same as that in a collective agreement; and
- the employer intended to undermine a collective agreement; and
- the effect of the passing of terms and conditions was to undermine the collective agreement.

Regard will also be had to the factors in section 59(6) as noted above.

That said, where an employer wishes to offer terms or conditions of employment to non-union members that are similar, or the same as those provided to union members, care must be taken. This is especially so during bargaining, where the threshold for unlawful passing on is much lower.

Please let us know if you have any questions about the impact of this case on your collective bargaining process. We would be very happy to assist you.